HANDOUT

IMMIGRATION AND REFUGEE LAW COMPONENT OF CLE SEMINAR SPONSORED BY THE U.S. DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

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INSTRUCTOR'S NOTE TO PARTICIPANTS

Pages 1-8 of this handout provide a general overview of US immigration and refugee law. I will be covering this material in the July 7 afternoon session but am also including this excerpt in case it's of future use. Reading it in advance would be helpful but is not at all essential.

In contrast, if your schedules permit, I would strongly recommend reading page 9 and then trying to map out, in advance of the seminar, a rough answer to the Simulation Exercise that appears on page 10. At the seminar we will work on this Simulation Exercise as a group. Preparing in advance will help you follow that group discussion and hopefully participate in it.

Looking forward to our meeting,

Steve Legomsky

OVERVIEW OF UNITED STATES IMMIGRATION LAW

[excerpted from Legomsky & Rodríguez,
Immigration and Refugee Law and Policy,
Foundation Press, 6th edition, 2015]

The Immigration and Nationality Act (INA), passed in 1952 and amended many times since, is a hideous creature. Its hundreds of pages contain excruciating technical provisions that are often intricately intertwined. Other sources of immigration law are similarly byzantine. The extensive inter-relationships make it hard to separate the law into discrete components that newcomers can comprehend without frequent cross-references and asides. This Overview addresses that problem. Superficial as it necessarily is, it acquaints you with a few basic concepts that will hopefully make the later discussion more comprehensible.

A. TERMINOLOGY

As explained more fully below, the INA defines "aliens" as all people who are not nationals of the United States. It then uses the word "alien" frequently and consistently. The term covers even people who have been admitted as permanent residents and who have lived lawfully in the United States for decades. Further, because the word "alien" is used in the INA and other federal statutes, it also appears often in agency regulations, judicial opinions, and other legal materials. In addition, the word is frequently used in public and academic discourse.

The earliest editions of this book, striving for precision and for consistency with the statutory terminology, similarly used the word "alien" in that technical sense. (Even the first edition drew the line at the pejorative, irritating, and technically meaningless term "illegal alien" and explained why. See pages 984–85 of the first edition (1992).) But the word "alien," even when not adorned with the modifier "illegal," has always struck a disturbing chord. Many feel that the term connotes dehumanizing qualities of either strangeness or inferiority (space aliens come readily to mind) and that its use builds walls, strips human beings of their essential dignity, and needlessly reinforces an "outsider" status. Some believe that its constant use and repetition also solidify racial and cultural stereotypes. See especially the thoughtful examination of the term "alien" by Professor Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 Univ. of Miami Inter-American L. Rev. 263 (1996–97).

Beginning with the third edition (2002), therefore, this book stopped using the word "alien" except in direct quotations. The word "noncitizen" conveys essentially the same technical meaning without the same baggage. (As explained below, "non-national" is more precise, but the word "noncitizen" is in far more common use and will be employed here.)

One acronym that you will see repeatedly in this book is "LPR." It stands for "lawful permanent resident" and is used here to refer to those noncitizens whom the United States has formally admitted as permanent residents. As proof of their status, LPRs carry so-called "green cards" (which actually have been various colors over the years).

Throughout this book you will also see repeated references to the INA, to certain other crucial statutes that have amended the INA, and to some important international conventions. Because these statutes and conventions are mentioned frequently, the book refers to them in shorthand terms that immigration lawyers commonly use. Among those you will see abbreviated are the REAL ID Act, the HSA, the USA PATRIOT Act, Imm. Act 1990, IRCA, IMFA, AEDPA, the Welfare Reform Act, IIRIRA, NACARA, LIFE, CAT, the 1951 Refugee Convention, and the 1967 Refugee Protocol. At first they will blur together, but after repeated exposure they will become old friends. Until that happens, consult the Table of Abbreviations. It contains the full citations to these statutes and conventions, as well as some other immigration jargon.

B. GENERAL REGULATION OF IMMIGRATION

Until the late 1800's, United States immigration law was largely a matter for the states. Today it is almost entirely federal (and to some extent international) law, although the fifty states still have some leeway to regulate the activities of noncitizens within their borders. For more than a century, the Supreme Court has held that Congress's power over immigration is exceptionally broad, both relative to the states and relative to the courts.

Several federal agencies have roles in administering the INA. From 1940 until 2003, the lion's share of the responsibility rested with the Attorney General, whose functions in turn were delegated to various Justice Department agencies and officials. The best known of the Department's immigration agencies was the Immigration and Naturalization Service (INS), headquartered in Washington, D.C. Its functions included law enforcement, inspection of arriving passengers, prosecution at administrative hearings, detention of noncitizens in connection with immigration proceedings, and processing applications for various immigration benefits.

The events of September 11, 2001 led eventually to a radical restructuring of the myriad federal government agencies whose missions relate to national security. The Homeland Security Act of 2002 (HSA) brought almost all of those agencies under a single new umbrella, the Department of Homeland Security (DHS). Some 22 federal agencies, 185,000 government employees, and countless specific functions were transferred. Most relevant here, the Act dissolved the INS and transferred almost all its functions to DHS. See HSA § 471(a).

Even before September 11, ideologically diverse voices had called persistently for splitting the INS into two separate agencies—one for law enforcement, and one for service functions, such as the processing of applications for permanent residence, asylum, naturalization, and other immigration benefits. When Congress passed the HSA, therefore, it divided the immigration enforcement and service functions between two different entities within DHS. See HSA §§ 442, 451. The HSA also authorized the President to modify the statutory departmental structure further, see HSA §§ 872, 1502, with the caveat that neither the two separate entities themselves, nor their specific functions, could be combined. HSA § 471(b). Acting on that authority, President Bush converted the two original DHS immigration agencies into three—two bureaus for the various enforcement functions, and one other bureau for service functions. See U.S. Department of Homeland Security Press Release, *Border Reorganization Fact Sheet* (Jan. 30, 2003) (DHS Press Release); see generally 6 USC.

The two immigration enforcement entities are U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). See 72 Fed. Reg. 20131 (Apr. 23, 2007). They are responsible for border enforcement and interior enforcement, respectively. CBP took over the functions of the INS Border Patrol and also consolidated the border inspections that were formerly carried out by the INS, the Customs Service, and the Agricultural Quarantine Program. CBP "border" inspections take place at all "ports of entry"—land borders, airports, and seaports. In contrast, ICE functions mainly in the interior. It is responsible for investigations, intelligence-gathering, detention, certain elements of the deportation process, the registration of noncitizens, and other interior enforcement operations. See DHS Press Release, above. You will see much more on the subject of immigration enforcement in chapter 10 below.

The immigration service entity is called U.S. Citizenship and Immigration Services (USCIS). See HSA § 451; 69 Fed. Reg. 60937 (Oct. 13, 2004) (changing the name). USCIS handles a variety of applications for immigration benefits. See HSA § 451(b). Like the former INS, USCIS operates through a network of regional and district offices dispersed throughout the United States and, in a few instances, overseas.

Although the Department of Justice no longer houses the entities that perform immigration enforcement and service functions, it retains authority over adjudication, in an agency called the Executive Office for Immigration Review (EOIR). In fact the HSA gave the EOIR statutory

recognition for the first time. HSA § 1101. (EOIR had been solely a creature of administrative regulation.)

EOIR comprises three units, all headquartered in Falls Church, Virginia. One unit is the Office of the Chief Immigration Judge. This Office coordinates the work of a cadre of immigration judges dispersed throughout the United States. Their main (but not sole) function is to preside over "removal" hearings. These are formal evidentiary hearings in which immigration judges decide whether to admit noncitizens to the United States and whether to expel certain noncitizens who are present after having been admitted. A second EOIR unit, the Board of Immigration Appeals (BIA), hears appeals from the decisions of the immigration judges as well as appeals from certain USCIS decisions. A third unit, the Office of the Chief Administrative Hearing Officer (OCAHO), conducts evidentiary hearings in certain cases that involve the unauthorized employment of noncitizens and cases that involve certain forms of job discrimination.

The HSA also codifies the Attorney General's power to direct and regulate the EOIR. See HSA §§ 1101, 1102(3) (adding INA § 103(g)). This power includes the authority to review individual decisions of the BIA. See 8 CFR § 1003.1(h) (2008). Importantly, BIA precedent decisions (and Attorney General modifications of those decisions) are binding on immigration judges and on all DHS officers and employees. 8 CFR § 1003.1(g) (2014).

The Department of State still plays a major role in the administration of the immigration laws, most notably by issuing or denying visas to noncitizens who wish to enter the United States. Visa applications are decided by consular officers at United States embassies and consulates around the world. See INA §§ 221, 222. Shaken by the State Department's lapses in issuing visas to the individuals who perpetrated the September 11 attacks, however, Congress gave DHS a major role in the visa process. The Secretary of Homeland Security is now principally responsible for the administration and enforcement of the visa process, HSA § 428(b), and may assign DHS employees to consular posts to advise, train, and review the decisions of consular officers, HSA § 428(e). The State Department also plays key roles in the various educational exchange programs and in refugee affairs (the latter through its Bureau of Population, Refugees, and Migration, or PRM).

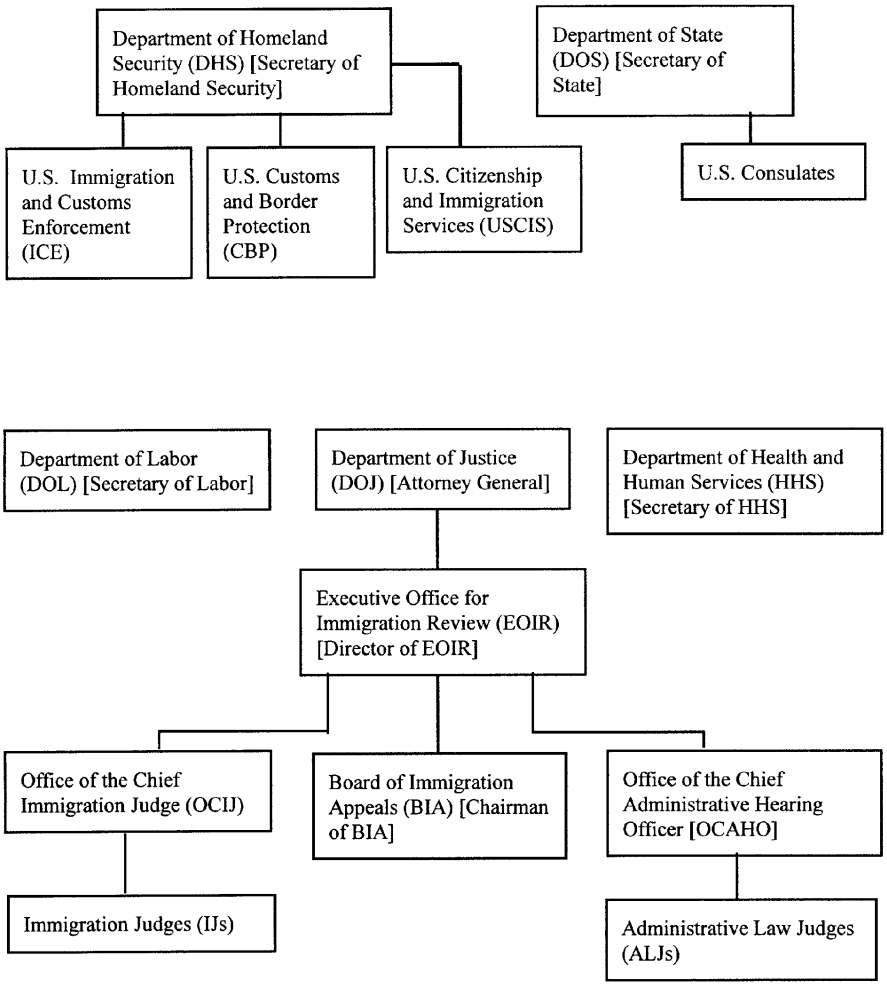
The role of the Department of Labor is also significant. As you will see in chapter 3, it is normally the first step in the process when a noncitizen seeks admission to the United States on the basis of occupational qualifications.

The Department of Health and Human Services has a more limited role. Its Office of Refugee Resettlement is responsible for the care and custody of unaccompanied noncitizen children. William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. 110–457, 122 Stat. 5044 (Dec. 23, 2008), § 235. The Department's Public Health Service makes the necessary medical judgments when a noncitizen is alleged to be inadmissible on health-related grounds. INA § 212(a)(1).

An organization chart for the main federal immigration agencies appears on the following page.

Finally, a few words on the statute and regulations: As noted earlier, the main statute that governs United States immigration law (including refugee law and citizenship law) is the INA, originally enacted in 1952 and amended frequently since then. Its essential provisions are reproduced in title 8 of the United States Code.

ORGANIZATION CHART
FEDERAL IMMIGRATION AGENCIES



C. NATIONALITY

According to the Immigration and Nationality Act (the INA), every person in the world is either a United States "national" or an "alien." Nationals are further divided into those who are "citizens" and those who are not. Today almost all nationals of the United States are also citizens; of the few who are not, almost all are natives of American Samoa and Swains Island. Since the number of noncitizen nationals is so small, and since their rights so closely resemble those of citizens anyway, the terms "national" and "citizen" are often used interchangeably. That practice is technically incorrect, but the distinction is rarely important. The INA lays out various categories of citizens (and of non-citizen nationals) and defines "aliens" as everyone else.

The vast majority of United States citizens acquired their citizenship at birth. The most common way in which to acquire citizenship at birth is to be born on United States soil. Several provisions of the INA also bestow citizenship by descent. With important qualifications, these provisions automatically transmit citizenship from one or two citizen parents to a child born abroad.

Many other people obtain citizenship at some time after birth. They are said to be "naturalized." The INA sets forth a number of prerequisites. With some exceptions, naturalization is something for which one must affirmatively apply. Also with exceptions, the applicant must first become an LPR, must thereafter reside in the United States for at least five years, and must satisfy other requirements concerning physical presence in the United States, age, literacy, knowledge of American history and government, moral character, and attachment to American constitutional principles.

Once acquired, citizenship can be lost. If citizenship was acquired by naturalization, the naturalization order can be revoked because of defects in the original order. Regardless whether citizenship was acquired at birth or by naturalization, one can voluntarily relinquish citizenship by a process known as expatriation.

Citizenship has important legal consequences, both in domestic United States law and in international law. Apart from its capacity to be transmitted, citizenship can affect one's voting and other political rights, one's tax, military, and jury obligations, one's susceptibility to extradition for crime, and one's eligibility for certain publicly funded programs, for certain government jobs, and for certain occupations. Congress, the state legislatures, and the federal courts have all helped to shape the boundaries. Most important here, United States citizens are not subject to immigration restrictions. They may come, go, and stay as they please. Additionally, as noted below, citizens may sponsor certain of their noncitizen family members for admission to the United States.

D. THE ADMISSION OF NONCITIZENS TO THE UNITED STATES

Within the class of noncitizens, the most fundamental distinction drawn by the United States immigration law is between immigrants and nonimmigrants. The INA defines nonimmigrants as those who fall within any of several specifically enumerated categories of (typically) temporary entrants. Common examples are tourists, business visitors, students, and temporary workers, but there are many others as well. By statute, every other noncitizen is an "immigrant." The term includes both those who have been lawfully admitted as immigrants ("LPRs") and those who have not ("undocumented immigrants"). LPRs may reside in the United States permanently unless later ordered removed (see section E below), and they may work.

With some exceptions (relating to temporary workers), the admission of nonimmigrants is numerically unrestricted. To qualify for admission, however, a nonimmigrant must still clear two major hurdles: He or she must fit within one of the statutory pigeonholes, most of which require an intent to leave the United States by the end of the authorized time period. In addition, the person must *not* fall within any of the "inadmissibility" grounds—for example, those that relate to crime, national security, health, or public assistance—unless he or she also fits one of several statutory provisions that authorize waivers of the relevant grounds.

An immigrant similarly has to fit within one of several statutory pigeonholes. The three main programs are family reunification, employment, and "diversity" (more on these below). Generally, each of the qualifying categories is numerically limited. Those limits, sometimes known as quotas or caps, are of two types. First, for each category, no more than a specified number may be admitted worldwide in a given fiscal year. Second, the law limits the number of immigrants who may be admitted from a single country in a given fiscal year. As will be seen in chapter 3, the combination of those quotas and the high demand from particular countries has meant that many noncitizens who meet all the qualitative admission criteria must wait several years to get in.

Numerical limits are subject to several exceptions. Two are important enough to mention here. Certain close family members of United States citizens qualify as "immediate relatives;" they are exempt from the numerical constraints. Another group of noncitizens—refugees fleeing statutorily defined forms of persecution at home—are admitted under a separate quota system.

Among those immigrants who are subject to the general quotas, admission is not awarded on a strict first-come, first-served basis. Instead, the INA gives "preference" to various categories of immigrants. Some such preferences are for noncitizens who have certain specified family relationships to United States citizens or to LPRs, but who for various reasons do not qualify as "immediate relatives." Other preference categories are for noncitizens whose occupational skills fill economic needs and for certain individuals who are favored for other economic reasons. A third program admits "diversity immigrants"—noncitizens who come from countries that have sent relatively few immigrants to the United States in recent years.

With some specific exceptions—the most important being refugees—a noncitizen *must* fit one of the above preferences in order to immigrate. Moreover, like the nonimmigrant, even an immigrant who fits one of the qualifying categories will be ineligible if he or she falls within any of the various inadmissibility grounds and does not qualify for and receive a statutory discretionary waiver.

The procedure for admitting noncitizens depends on the substantive basis for admission. When an immigrant seeks admission on the basis of a family relationship, the process begins with a "visa petition" filed by the United States citizen or LPR sponsor in a regional service center of USCIS, normally in the United States. The main purpose of the visa petition is to establish that the beneficiary in fact has the claimed relationship. If USCIS approves the visa petition, the beneficiary may then apply for a visa at whichever United States consulate serves the applicable region of his or her home country. When the applicant's position in the queue is reached, a consular officer adjudicates the application. The consular officer decides whether the person falls within any of the various inadmissibility grounds. If the application is approved, the consular officer issues an entry document called an immigrant "visa." The applicant eventually presents the visa to a CBP inspector at the port of entry. That official has the authority to duplicate the searching examination conducted abroad by the consular officer, but in practice the border inspection of a person who presents what appears to be a valid visa is much less rigorous.

When an immigrant seeks admission under one of the employment-based categories, a roughly similar process is used. For certain of those categories, however, the immigrant must first obtain from the Department of Labor a certification that (a) the job he or she proposes to take is one for which not enough qualified United States workers are available and (b) the immigrant's employment will not adversely affect the wages and working conditions of United States workers.

In certain instances a noncitizen who is already present in the United States and who meets all the substantive requirements for admission as an immigrant may perform all the necessary steps without leaving the country. The process is called "adjustment of status."

Refugees, generally defined to require a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," are admitted under two separate programs. The overseas refugee program, for which the President annually announces numerical limits, admits refugees who apply from outside United States territory. The asylum program, which is not subject to numerical limits, is used to admit certain refugees who have already arrived at United States ports of entry or the interior on their own. Both programs are discussed in chapter 11.

Most categories of nonimmigrants are not required to file visa petitions with USCIS. They generally apply directly to the applicable consulates for visas that they will ultimately present to the immigration inspectors at their points of entry. A few categories of nonimmigrants, however, must go through the visa petition process, and some must first complete the labor certification process as well.

Once admitted as a nonimmigrant, one will sometimes be able to alter the conditions or duration of his or her stay, or change status entirely to a different nonimmigrant category

("change of status") or to an immigrant classification ("adjustment of status"). The processes for accomplishing those changes involve USCIS and, in some instances, the Labor Department.

As you have probably noticed already, there are several stages at which a person seeking admission can be turned down. Depending on the particular stage, the applicant might or might not have a right to a hearing or an appeal. Depending on several other variables, the applicant might or might not be detained pending the final outcome of his or her case. The procedural details appear in chapter 6.

In recent years, Congress has created exceptions to the admission process just described. Probably the most significant is "expedited removal," an abbreviated procedure that has its greatest impact on asylum seekers. This and other exceptions will be taken up at various points in the text.

E. EXPULSION

The INA lists many different grounds for the removal of "deportable" noncitizens. Like the (slightly different) grounds for inadmissibility, the "deportability" grounds reflect a range of national concerns relating to economics, crime, health, morality, politics, and national security. Additional deportability grounds are designed to secure the integrity of the immigration inspection system itself. The deportability grounds are accompanied by a network of statutory provisions that authorize discretionary waivers of specified grounds when certain circumstances exist. Eligibility for these waivers has shrunk considerably in recent years.

When noncitizens already in the United States are removed, it is usually because they overstayed or otherwise violated the terms of their nonimmigrant visas, or because they never were admitted and are not admissible. But lawfully admitted noncitizens—even LPRs—can also be deported for conduct or circumstances not concerned with the immigration system itself; certain criminal convictions are the most common example.

As discussed in detail later, the formal procedure for the expulsion of noncitizens is called a "removal" proceeding. DHS (usually ICE) initiates those proceedings, which entail evidentiary hearings before the immigration judges mentioned earlier. The job of the immigration judge in those proceedings is to determine whether the individual falls within any of the charged "inadmissibility" or "deportability" grounds and, if so, whether he or she is statutorily eligible for, and deserving of, asylum, voluntary departure, or some other form of discretionary relief. In most cases, the principal issues at the hearing concern applications for relief. Either the noncitizen or ICE may appeal the decision of the immigration judge to the BIA. Subject to many recently enacted exceptions, the noncitizen may also obtain judicial review of the BIA decision in the court of appeals.

F. OTHER SANCTIONS

The INA and provisions of other federal statutes establish a range of civil and criminal sanctions for immigration-related misconduct. Some such sanctions are imposed on the noncitizens themselves; others are visited upon designated individuals or companies with whom they interact. The best known of the latter are those imposed on employers by the Immigration Reform and Control Act of 1986, popularly known as IRCA. IRCA punishes employers and certain others for knowingly employing noncitizens who are not authorized to work, for hiring persons without observing specified paperwork requirements (even if the employees turn out to be authorized to work), or for discriminating on the basis of national origin or, in certain cases, citizenship status.

Apart from IRCA, the immigration laws create a number of criminal offenses concerned with maintaining a workable system of immigration control. They include illegal entry; transporting, smuggling, or harboring noncitizens who are in the United States unlawfully; and fraud,

including marriage fraud. Over at least the past two decades, the government has made dramatically increased use of these criminal sanctions. In addition, commercial carriers (airlines, shipping lines, bus companies, railroad companies, etc.) that transport improperly documented noncitizen passengers are subject to civil penalties, usually fines.

SUMMARY OF MAIN FAMILY REUNIFICATION CATEGORIES FOR ADMISSION AS LAWFUL PERMANENT RESIDENTS

A. "Immediate relatives" are exempt from all numerical limits, so they can be admitted as lawful permanent residents as soon as the paperwork is completed. Immediate relatives include

1. The spouses of US citizens;
2. The parents of over-age-21 US citizens; and
3. The "children" of US citizens. But NB: "Children" must be unmarried and under 21.

Additional restrictions apply to stepchildren, adopted children, and those born out of wedlock.

B. "Family-sponsored" immigrants comprise four subcategories. All four are subject to annual numerical limits. The resulting backlogs generate waiting periods that vary depending on the particular subcategory and the country of birth. The State Department's monthly Visa Bulletin provides the estimated waiting times. The four subcategories are

First preference: Unmarried sons and daughters of US citizens
2A preference: Spouses and "children" (unmarried, under age 21) of LPRs
2B preference: Unmarried over-age-21 sons and daughters of LPRs
Third preference: Married sons and daughters of US citizens
Fourth preference: Brothers and sisters of over-age-21 US citizens

C. Under INA § 203(d), a spouse or child accompanying or following to join a preference immigrant has the same preference as the principal immigrant. But NB: This provision applies only to those spouse and child relationships that were formed before the admission of the principal immigrant. "After-acquired" spouses and children do not benefit from section 203(d).

STATE DEPARTMENT VISA BULLETIN FOR JUNE 2017

On the chart below, the listing of a date for any class indicates that the class is oversubscribed; "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. [A date refers to the date on which applicants currently being admitted began the application process.]

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	22DEC10	22DEC10	22DEC10	01SEP95	22APR06
F2A	15AUG15	15AUG15	15AUG15	22JUL15	15AUG15
F2B	22OCT10	22OCT10	22OCT10	08APR96	22SEP06
F3	01JUL05	01JUL05	01JUL05	22FEB95	08OCT94
F4	08MAY04	08MAY04	15SEP03	15JUL97	22NOV93

SIMULATION EXERCISE

In doing this exercise, assume it is now June 2017 and consider each individual's possible routes to lawful permanent resident (LPR) status in the United States. To map out your strategy, you will need to consult the preceding Visa Bulletin. Keep in mind also that, after five years of LPR status (or three years "living in marital union" with a US citizen after attainment of LPR status), one may apply for naturalization to US citizenship. INA §§ 316(a), 319(a).

(1) It is now June 2017. X was admitted as an LPR four years ago. He has just married Y, a native and citizen of Costa Rica. Y wants to become an LPR as well. Y is very close to her sister Z, who is married and has two sons, ages 2 and 7. Z and her husband and sons are all Costa Rican citizens. X is in your office. He wants your help in securing LPR status for Y and, if possible, Z and her husband and sons. What advice would you give X?

(2) Would your advice change if all the intending immigrants were natives of the Philippines rather than Costa Rica, assuming all the other facts remain the same?